In the Supreme Court of the United States.

PETITION OF THE ERIE & WESTERN TRANSPORTATION CO., THE BRITISH & FOREIGN MARINE INSURANCE CO., LIMITED, THE INSURANCE COMPANY OF NORTH AMERICA, THE UNION MARINE INSURANCE COMPANY, LIMITED, AND THE MARINE INSURANCE CO.

PETITION FOR WRIT OF CERTIORARI.

HARVEY D. GOULDER,
JOHN C. SHAW,
Proctors for Petitioner, The Erie & Western Transportation Co.

F. H. CANFIELD,
Proctor for Petitioners, The British & Foreign Marine Insurance Co., et. al.

THE FERRIS-BISSETT-HATCH CO., CLEVELAND, O.

In the Supreme Court of the United States.

The petition of The Erie & Western Transportation Company, The British & Foreign Marine Insurance Company, Limited, The Insurance Company of North America, The Union Marine Insurance Company, Limited, and The Marine Insurance Company, for writ of certiorari, directed to the Circuit Court of Appeals for the Sixth Circuit, to bring before the Supreme Court the case of The Union Steamboat Company, Claimant and Appellant, against the propeller Conemaugh, The Erie & Western Transportation Company, et al., Claimants and Intervenors.

To the Honorable Judges of the Supreme Court of the United States.

The said petitioners respectfully show to this court as follows:

I. Your petitioner, the Erie & Western Transportation Company, is a corporation of the Commonwealth of Pennsylvania, and the other petitioners are insurance companies and corporations duly created and existing under the laws of various states and countries, and that the said transportation company is the owner of the propeller Conemaugh and was at the time of the collision mentioned in this cause, and that the other petitioners were underwriters on her cargo and as such suffered a loss by reason of said collision, the aggregate of the loss, as fixed by the decree of the District Court herein, being $69,978.91.

II. The case grows out of a collision which occurred on a clear, pleasant, starlight evening, close to the Canadian bank of the Detroit river, a short distance below the city of Detroit, between the said propeller Conemaugh, bound down and laden with miscellaneous cargo, and the Union Steamboat Company's steamer, the New York, bound up the river, in which the Conemaugh was struck on her starboard side forward and almost immediately thereafter beached and filled on the Canadian channel bank.

III. The Conemaugh, with all the signal lights required by law, properly placed and burning brightly, having a full complement of officers properly stationed and attentive to their duties, with two men at the wheel, was proceeding down on a course somewhat to the American side of midchannel. Reaching a point about three-quarters of a mile above a dock on the American side, known as Smith's coal dock, her watch discovered the propeller Burlington, with a tow of four lumber barges, whose course down the river had been on the Canadian side of midchannel, but was now rounding to for the purpose of coming up to Smith's dock. The full length of the tow was about 2826 feet; the channel at that point was about five-eighths of a mile in width. When

the Burlington had come around so as to exhibit to the Conemaugh her green and white lights, and the first barge her green light, the Burlington blew a signal of two blasts, thereby indicating to the Conemaugh that she should pass down between the tow and the Canadian shore. The Conemaugh answered with two blasts, checked the speed of her engine from 70 to 40 revolutions, and hard starboarded in accordance with the signals exchanged. The master of the Conemaugh seeing, with the aid of his glass, that there was sufficient room for him to pass between the tow and the Canadian shore, assumed a course diagonally across the river, and while on that course the watch on the Conemaugh discovered the lights of what proved to be the propeller New York coming up the river a considerable distance below the tow, and sounded to her a signal of two blasts, indicating her purpose to continue her course and pass down on the Canadian side. The Conemaugh was then in Canadian waters, and the New York, apparently, about midchannel. Receiving no answer, the Conemaugh repeated her signal, but without receiving any reply. The vessels were then perhaps three-quarters of a mile apart. The clear space of navigable water between the tow and the Canadian channel bank, as found by the Circuit Court of Appeals, was not less than five hundred feet, according to the lowest estimates given by the witnesses, a space sufficient for the navigation of the steamers.

The Burlington was then well over to the dock on the American side, the tow forming nearly a semi-circle, the last barge heading some two points to starboard from directly down the river and working down at a speed of about four miles an hour, including the drift of about a two mile current. The Conemaugh was going at checked speed over toward the Canadian shore, heading some 45° from directly across; the New York was on a course below the tow, which, as was later developed by testimony fromthe barges, would have brought her in collision with the third barge of the tow.

In this situation the Conemaugh again blew a signal of two blasts. Dispute exists as to her distance astern of the tow, the shortest distance suggested by the testimony being three hundred feet; clear evidence, in our opinion, fixing it at from seven hundred to a thousand feet.

As indicated by the lights of the New York, the Conemaugh was crossing the course of the New York at a safe distance ahead, both vessels navigating in Canadian water.

To this third signal of two blasts there was no answer. Shortly afterward the New York, doubtless for the purpose of avoiding the rear barges of the tow, but without signal of any character to the Conemaugh, altered her course by porting; thereupon the Conemaugh blew an alarm signal, put her wheel hard astarboard and gave a strong signal to the engine. The New York, then abreast of a point between the last two barges of the tow, and, in any view of the testimony, not over a quarter of a mile from the Conemaugh, stood on with undiminished speed and having started to swing back on starboard helm, struck the Conemaugh near the forward gangway and she sank within a length (250 feet) of the Canadian bank. The evening being clear and starlight, there was nothing to prevent the New York from seeing the Conemaugh's lights or hearing her signals if a proper watch were kept.

The New York, although her officers and crew were in court,

called no witnesses, but her answer admitted an entire failure to see the lights of the Conemaugh or to regard her signals, the language of her answer being,

> "when the New York had arrived at a point abreast of the "last barge in tow, a signal of two whistles was heard, but being "unable to see any vessels, and noticing only a white light close "on the Canadian bank of the river, the signal of two blasts "was not answered, as it seemed to be intended for some other "vessel";

also that while passing under the stern of the last barge, having starboarded her helm, she heard several short blasts of the Conemaugh close at hand, not more than 100 feet away, but

> "collision was then inevitable, but there was neither time nor "room enough to stop the engine of the New York, and the only "way left open to avoid a collision was to continue under "headway and swing clear under a hard-a-starboard helm."

Before the Burlington had rounded to and sounded the signal of two blasts to the Conemaugh, she had exchanged a signal of one blast with the New York, then a mile and a half or more below the Burlington and coming up somewhat on the American side of midchannel. The New York and Conemaugh were more than three miles apart and these signals were not heard on the Conemaugh nor was the presence of the New York discovered by the Conemaugh, although a proper watch was kept, until after the Conemaugh had starboarded and was in the performance of her agreement with the Burlington, as before stated.

The Circuit Court of Appeals found,

> "The New York was proceeding from the American side in "a slanting direction across the river, while the Conemaugh "was proceeding down the river in a slanting direction, and "each must have been showing to the other but one (colored) "light."

Also,

> "It is not disputed that the courses of the two vessels were "crossing, so as to involve risk of collision, and that the Con-"maugh had the New York on her own starboard side."

And,

> "The Conemaugh, therefore, being where she was, was either "in, or dangerously near, the course of the New York, and was "not keeping out of her way."

Although the Conemaugh had indicated to the New York by her signal, repeated three times, her intention to cross the bows of the New York, and although, as admitted in the answer, the Conemaugh "continued on her course across the bows of the New York so that the latter struck her stem on," yet the New York did not at any time signal the Conemaugh, nor did she stop or check her speed before the collision occurred.

IV. On the 11th day of Nov., 1891, the Erie & Western Transportation Company filed its libel in the District Court for the Eastern District of Michigan on behalf of itself as owner of the Conemaugh and as trustee for persons interested in her cargo, and subsequently the insurance companies joining herein intervened for their interest as underwriters on cargo. Answer was duly filed containing the admissions already stated. The case came on for hearing before the District

Court. The witnesses for petitioners, including the officers and crew of the Conemaugh, were examined in open court, and it was held that the collision occurred 900 or 1,000 feet from and a little on the port quarter of the stern barge of the Burlington tow, which barge was held to have been 800 or 900 feet from the Canadian shore, headed somewhat toward the American side of the river. The court held that, assuming a temporary departure by the New York from her course to have been necessary and justified by the presence of the tow, still there was ample room for her to starboard and resume her course after passing the tow, which would have taken her astern of the Conemaugh; that this was a plain duty on her part which the master of the Conemaugh had a right to expect her to perform, as the Conemaugh had then "crossed the lawful path of the New York." Also, that the proofs established that the New York maintained double the speed of four miles, stated in her answer, until the vessels came together and was grossly in fault and negligent in failing to see the lights and hear the signals of the Conemaugh; or, seeing and hearing, guilty of even worse fault in disregarding them. It held that the faults of the New York were so many and flagrant that "it may be doubted if judicial records afford a parallel to the negligence and recklessness of her navigation." See copy of opinion "A" hereto attached, (53 Fed. 553.)

Having found that the Conemaugh had in fact crossed the lawful course of the New York and was free from fault until the danger signal was blown, the court condemned the Conemaugh for failure to reverse; but afterwards, on petition for rehearing, in view of the fact that collision was then inevitable and so expressly admitted in the answer, and in view of the then recent utterance of this court in the city of New York, 147 U. S. 85, the court modified its decree and exonerated the Conemaugh, as will appear from copy of the opinion of the Court rendered May 16, 1895, a copy of which is hereto attached "B".

V. The case was duly appealed by owner of the New York, to the Circuit Court of Appeals, and that court, modifying only slightly the facts as found by the District Court and addressing its consideration to the three faults against the New York:

1st. In failing to keep a proper lookout and answer signals;
2d. In failing to keep her course; and
3d. In not stopping and reversing when there was danger of collision,

reversed the decree of the District Court, held the New York to be free from fault, dismissed the libel and ordered a personal decree against your petitioner, the Erie & Western Transportation Company, for the damages to the New York, as will appear from the opinion of that court filed October 5, 1897, hereto attached: "C"; (82 Fed. 819). Afterwards petition for rehearing was denied.

VI. Your petitioners respectfully represent to the court that the decree of the District Court in the case should have been affirmed, and that there are several questions involved in this litigation of a general character upon which there have been conflicting decisions of the lower courts, the settlement of which by this court is highly desirable.

1. The Circuit Court of Appeals holds that the great lakes and their connecting waters are so far "lakes and inland waters of the United States" as to be excluded from the operation of the International

Regulations for prevention of collision at sea, adopted by the United States in 1885, (23 St. 438), and which had been adopted substantially in the same form by the leading nations, and which, as hereinafter shown, governed in Canadian waters.

2. The court also held that it could not regard the Canadian Regulations without technical proof of the law.

The Canadian regulations applicable are Articles 15, 16, 18, 19, 22 and 23 of "An Act respecting the Navigation of Canadian Waters, R. S. C. c. 79," founded on the Imperial Regulations, which came into force September 1, 1884, (Order in Council, 9 P. D. 248), which are identical with the corresponding articles of the International Rules as adopted by us in 1885 (23 St. 438) as follows:

Art. 15.—

"If two ships under steam are meeting end on, or nearly end "on, so as to involve risk of collision, each shall alter her "course to starboard, so that each may pass on the port side of "the other:

(*a*) "This article only applies to cases where ships are meeting "end on, or nearly end on, in such a manner as to involve risk "of collision, and does not apply to two ships which must, if "both keep on their respective courses, pass clear of each other;

(*b*) "The only cases to which it does apply are, when each of the "two ships is end on, or nearly end on, to the other; in other "words, to cases in which, by day, each ship sees the masts of "the other in a line, or nearly in a line with her own; and by "night, to cases in which each ship is in such a position as to "see both the side lights of the other;

(*c*) "It does not apply by day, to cases in which a ship sees "another ahead crossing her own course, or by night, to cases "where the red light of one ship is opposed to the red light of "the other, or where the green light of one ship is opposed to "the green light of the other, or where a red light without a "green light, or a green light without a red light, is seen "ahead, or where both green and red lights are seen anywhere "but ahead."

Art. 16.—

"If two ships under steam are crossing, so as to involve risk of "collision, the ship which has the other on her own starboard "side shall keep out of the way of the other.

Art. 18.—

"Every steamship when approaching another ship, so as to "involve risk of collision, shall slacken her speed or stop and "reverse, if necessary.

Art. 19.—

"In taking any course authorized or required by these regula-"tions, a steamship under way may indicate that course to any "other ship which she has in sight by the following signals on "her steam whistle, that is to say:

"One short blast to mean 'I am directing my course to star-"board';

"Two short blasts to mean, 'I am directing my course to port';

"Three short blasts to meam 'I am going full speed astern.'

" The use of these signals is optional; but if they are used, the
" course of the ship must be in accordance with the signal made."

Art. 22.—

" When by the above rules one of two ships is to keep out of
" the way, the other shall keep her course."

Art. 23.—

" In obeying and construing these rules, due regard shall be
" had to all dangers of navigation, and to any special circum-
" stances which may render a departure from the above rules
" necessary in order to avoid immediate danger."

Under such rules, making the use of signals optional with each steamer, the finding of the Circuit Court of Appeals that the silence of the New York in the face of our signals denoted dissent to our proposal, would have been clearly wrong.

3. Though these vessels were in Canadian waters, the court applied the rules found in Sec. 4233 of the Revised Statutes, and Rule 2 of the Supervising Inspectors' rules which latter require a steamer, having another on her starboard hand, to keep out of the way by porting.

Rules 1, 2 and 3 of pilot rules for lakes and seaboard, are as follows:

Rule I—

" When steamers are approaching each other 'head and head,'
" or nearly so, it shall be the duty of each steamer to pass to the
" right, or port side of the other; and the pilot of either steamer
" may be first in determining to pursue this course, and there-
" upon shall give, as a signal of his intention, one short and dis-
" tinct blast of his steam whistle, which the pilot of the other
" steamer shall answer promptly by a similar blast of his steam
" whistle, and thereupon such steamers shall pass to the right,
" or port side of each other. But if the course of such steamers
" is so far on the starboard of each other as not to be considered
" by pilots as meeting 'head and head,' or nearly so, the pilot so
" first deciding shall immediately give two short and distinct
" blasts of his steam whistle, which the pilot of the other steamer
" shall answer promptly by two similar blasts of his steam
" whistle, and they shall pass to the left, or on the starboard
" side of each other."

Rule II—

" When steamers are approaching each other in an oblique
" direction (as shown in diagram of the fourth situation), they
" shall pass to the right of each other, as if meeting 'head and
" head,' or nearly so, and the signals by whistle shall be given
" and answered promptly as in that case specified."

Rule III—

" If, when steamers are approaching each other, the pilot of
" either vessel fails to understand the course or intention of the
" other, whether from signals being given or answered errone-
" ously, or from other causes, the pilot so in doubt shall imme-
" diately signify the same by giving several short and rapid blasts
" of the steam whistle; and if the vessels shall have approached
" within half a mile of each other, both shall be immediately
" slowed to a speed barely sufficient for steerageway until the
" proper signals are given, answered and understood, or until the
" vessels shall have passed each other."

The Supervisors' rules, extended to foreign waters, were applied to the Conemaugh, but notwithstanding the plain provisions of Rule III, the absence of lookout and ignorance of the other steamer's presence in dangerous situation, giving signals of an intention to cross the New York's bow, were excused on the ground that seeing lights and hearing signals indicating such course, the New York would still have had the right to maintain her speed in silence.

As to these questions the contention was and is that the great lakes are not to be excluded as "lakes and inland waters" from the operation of the Navigation Act of 1885; that the Supervisors' rules have no extra-territorial force, and if they had, that rule 2, given a construction which when a steamer has another on her own starboard hand, requires the burdened steamer in any such situation, even when practically crossing the course of another at a safe distance ahead, in every case to port, is unreasonable, is in derogation of the statute which, fixing the starboard hand rule, makes no requirement as to how the burdened steamer shall keep out of the way, and so without force; and that a court of admiralty will take judicial notice of the navigation rules of another sovereignty for preventing collision at sea when they are of the character of the Canadian rules.

4. The Circuit Court of Appeals also held that although these steamers were on crossing courses so as to involve risk of collision, and although the Conemaugh had signaled her intention to continue on her course across the bows of the New York, and although under the rules applicable under the revised statutes, it was the duty of the New York to keep her course, still the New York was justified in changing her course to starboard, and in the direction of the course of the Conemaugh, because of the presence of the stern barges of the Burlington's tow, which, as petitioners show, were a temporary moving obstacle in the way of the New York, and which were then moving toward the American shore out of the way of the New York, and which the New York might have avoided by checking or stopping and breasting the current until said barges had gotten out of her way. Upon this point the Court of Appeals in its opinion said:

> " It is well settled * * that a vessel does not depart from " her course when she turns from her general course to avoid " obstructions, of which the vessel keeping out of her way " must know the existence, and must allow for the effect. * * " The proper course of the New York was that which the Cone- " maugh ought to have known, she would naturally have taken " had the Conemaugh not been in sight."

5. The Circuit Court of Appeals also held that the New York having changed her course on account of said barges, was not obliged immediately to resume her course after passing the last barge. Upon this point the court, in its opinion, said:

> "But it is said that after the New York passed the tow her " proper course was to swing to port under the stern of the last " vessel in the tow, and thence over towards midchannel, instead " of which she continued on towards the Canadian shore, and " ran into the Conemaugh. It is undoubtedly true that the New " York's proper course, after passing the tow, was to resume her " general course up stream near midchannel. All the witnesses " who observed her course, admit that just before the collision she

"was swinging under a starboard wheel. It would seem, there-
"fore, that she had begun to change her course to port; and
"the only question is, did she begin to do this as soon as she
"ought to have done it? * * * She was not obliged to
"turn a sharp corner around the stern of the last barge in the
"tow. She certainly would not have done this had the Cone-
"maugh not been there, and as we have seen, her proper course
"could not be affected by the fact of the Conemaugh's presence."

The contention of petitioners is that the New York having received signals of two blasts from the Conemaugh, which had her on the starboard hand, was under obligation *as to the Conemaugh* to hold her course, and had no right, especially without giving notice by signaling, to make a change of course which must necessarily tend to hamper the maneuvers of the Conemaugh; that said moving barges did not constitute such an obstruction as justified the New York in changing her course, and if the New York did have the right to change her course in the manner and for the reasons indicated, *she was bound in duty to the Conemaugh to make the least change necessary and to come back to her original course as quickly as practicable after clearing the end of the tow.*

It is found by both courts that there was ample channel room (not less than 500 feet) and the conflict of opinion arises on the finding by the Court of Appeals that the New York did not owe this duty to the Conemaugh, but in making the departure in the direction which tended to interfere with the Conemaugh's announced maneuver for clearing, had the right to pursue such a course in the premises as she would had the Conemaugh not been present.

The Circuit Court of Appeals also held that the New York was entirely without fault, though she failed to maintain lookout or watch or to observe the signals and lights of the Conemaugh or to make any effort whatever to avoid or minimize the effect of collision, since she had the right to navigate as she did.

Contention on this point is that the New York was in fault in this respect in as much as the signals and lights of the Conemaugh, if observed, should have led the New York to check her speed and so obviate the necessity of turning out for the tow; or, if she chose to go on, to make that departure only so great as was necessary to clear the obstruction and then pass to starboard of the Conemaugh; or, in any case, she would have had time to reverse; whereas, the plain admission of her answer is that continuing her speed she did not know and recognize the presence of the Conemaugh in her vicinity, or as affecting in any manner her navigation, until, in the language of the answer:

"A collision was then inevitable, and there was neither time
"nor room enough to stop the engine of the New York."

Indeed, a previous statement of the answer puts the Conemaugh then "close at hand and not more than 100 feet away."

VII. Your petitioner further avers that the present case is one in which it is proper for this court to issue a writ of *certiorari* for the following reasons:

1. (*a*) The questions involved arise under collision rules which relate to the navigation of the great lakes, and involve the question whether the American or Canadian law controls in the navigation of American ships in Canadian waters, into

and through which nearly all of the immense commerce of the great lakes must pass in some portion of the voyage.

(*b*). Also the question of the extra-territorial force of the rules of the Supervising Inspectors, vessels being required to navigate, as stated, in foreign waters.

(*c*). The statute requiring a steamer having another on her own starboard hand to keep out of the way, whether it is competent for the Supervising Inspectors to pass a supplementary rule requiring this to be done in a particular manner.

(*d*). After the starboard hand rule has come into operation between two steamers, whether the intervention of another moving steamer is such a special circumstance as will permit the privileged steamer to alter her course, at night, without notice, in such manner as to conflict with the maneuvre of the burdened steamer to clear, although it is clear that such privileged steamer may at the same time avoid the intervening vessel and hold her own course as to the burdened steamer by simply checking her speed?

(*e*). Granting such right, should she make the least deviation necessary and come back as quickly as practicable, or may she make such deviation as if the vessel bound to keep out of her way were not present?

(*f*). After the starboard hand rule has come into operation, with its burden and privilege respectively, is the privileged steamer so far priveleged as to her course and speed that it is unnecessary for her, at night, to regard the lights and signals of the approaching steamer; and is she so far privileged that upon the intervention of a temporary, floating obstacle, which she may avoid by checking and still hold her course as to the burdened vessel, that, though she chose to maintain her speed and alter her course in a manner and direction which must necessarily embarrass and may thwart the manœuvre to the burdened steamer to clear, it is unnecessary for her to pay any heed to or give any notice to the burdened vessel of her intention?

(*g*). Is the privileged vessel so far privileged that when the burdened vessel is "either in, or dangerously near" the course of the privileged vessel, and is "not keeping out of her way," the privileged vessel need neither stop nor reverse, but having altered her course for a temporary obstacle, may turn back to midchannel on an "easy sweep" regardless of the presence of the burdened vessel?

3. The amount involved is large, being with the New Yew York's damage about $73,000.00.

3. The decision of the Circuit Court of Appeals as it stands is opposed to decisions of the admiralty courts of this country.

4. The decision of the Circuit Court of Appeals as it stands, exonerates the New York for making a departure from her course at night without notice, after being signaled by the Conemaugh and after the starboard hand rules had become operative, so long as that departure, being on account of a temporary floating obstacle, was not greater than she might have made *had the Conemaugh not been there signaling her and though she might in fact have made less departure and so avoided collision.*

5. The decision of the Circuit Court of Appeals exonerates the New York, although she had no lookout or any competent watch, and was ignorant of the presence of a large steamer which had been displaying proper lights and blowing repeated signals until that steamer, with which she collides, was within a hundred feet and collision was inevitable, though the collision occurs while she is engaged in a conflicting change of course made without notice to avoid another moving vessel, after coming under the operation of a rule requiring her to hold her course, and without which change or with a smaller departure, which was possible, the collision would not have occurred.

Wherefore, your petitioners pray that this Honorable Court will be pleased to grant a writ of *certiorari* in this case to the Circuit Court of Appeals for the Sixth Circuit to bring up this case to this Honorable Court for such proceedings as shall seem just.

The Erie & Western Transportation Co.
By Harvey D. Goulder, Proctor.
The British & Foreign Marine Insurance Co., Limited
The Insurance Company of North America
The Union Marine Insurance Company, Limited,
The Marine Insurance Company
By F. H. & G. L. Canfield,
Proctors for
The British & Foreign Marine Ins. Co. et al
Petitioners

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF NEW YORK,
COUNTY OF ERIE, SS.

E. T Evans, being duly sworn on his oath says that he is the agent of the petitioner herein the Erie & Western Transportation Co.; that said petitioner is a corporation, that deponent has read the foregoing petition and that the same is true to the deponent's knowledge, information and belief, and deponent's knowledge is derived from the fact that he has acted for said petitioner in all matters connected with this litigation.

E. T. Evans.

Subscribed in my presence and sworn to before me this 29th day of March, A. D., 1898.

Harvey L. Brown
Notary Public
Erie County, N.Y.

We hereby certify that we have examined the foregoing petition and in our opinion the petition is well founded and the case is one in which the prayer of the petition should be granted.

Harvey X. Goulder,
Proctor for B. & N. T. Co.
F. H. Canfield, Counsel.

EXHIBIT "A."

Opinions of the District Court.

(53 Fed. 553.)

SWAN, District Judge. The original libel in this cause was filed by the owner of the Conemaugh to recover damages for the sinking of that steamer by the propeller New York, October 21, 1891, in the Detroit river, a short distance below Sandwich, Ont. The New York also received injury, for which her owner filed a cross libel against the Conemaugh. The cases were heard as one. No proofs were offered on the part of the New York.

The circumstances attending the collision were as follows: The Conemaugh, a screw steamer of 1,609 tons burden, (registered,) and laden with 1,800 tons of flour and general merchandise, was on her way from Milwaukee to Erie, Pa. She had a full watch on deck, and her lights were properly placed and burning brightly. Between 7 and 8 o'clock p. m. of October 21, 1891, the night being clear and the weather fine, she had reached the vicinity of the Kasota piles,—the remains of a cofferdam used in raising the steamer Kasota, which had been there sunk,—which were on the American side, near midchannel, and about three-quarters of a mile above Smith's coal dock, hereinafter mentioned. At this point the Conemaugh received a signal of two blasts of the steam whistle of the steamer Burlington, which was bound down, having a tow of four vessels, and at that time was rounding to at Smith's coal dock, on the American side, for fuel, and exhibiting her masthead and green lights to the watch of the Conemaugh, who also saw the green light of the first vessel in tow as she followed the Burlington around, and cabin lights on other vessels of the tow. The Burlington and tow, in their evolution, formed a crescent whose westerly point was the coal dock, while its easterly end was further up the river and near the Canadian shore. The Conemaugh answered the Burlington's signal with two blasts. Her helm was put hard-a-starboard, her speed immediately checked, and she swung across the stream a short distance below the Kasota piles at an angle of about eight points from her former course. Finding that she was heading above the stern vessel of the tow, the Conemaugh's wheel was steadied and then ported to follow the tow, which in circling around occupied most of the navigable channel, leaving a passage on the Canadian or tow's port side. About simultaneously with the steadying of the Conemaugh, her master saw below the tow, and about a mile away, the white and red lights of an ascending steamer, which proved to be the New York, then somewhat on the American side of midchannel, and promptly gave her a passing signal, of two blasts of her whistle. To this no answer was made by the New York. When the two steamers were about three-quarters of a mile apart the Conemaugh repeated her signal; the New York then showing her masthead and both colored lights. No reply was made by the New York to this second signal. The Conemaugh, still exhibiting only her masthead and green light, and heading about four points towards the Canadian shore from a direct course down the river, sounded a third signal of two blasts; the New York continuing to show all three of her lights, and being then

apparently between and close on the port hand of the second and third barges of the tow. The last barge in tow was at this time a little forward of the starboard beam of the Conemaugh, about three lengths—say eight or nine hundred feet—below her, and the same distance from the Canadian shore. The New York made no answer to the Conemaugh's third signal, nor did she reduce her speed. About this time the Conemaugh, still running under check, steadied from the port helm, and almost simultaneously lost the green light of the New York, whereupon she sounded an alarm of several short blasts of her whistle, and put her wheel hard-a-starboard. The New York, running at full speed, was then about midway between the third and fourth barges of the tow, while the Conemaugh had just crossed the wake of the stern barge,—the Ferguson. The two steamers were then on converging courses about a quarter of a mile apart. The Conemaugh kept on at full speed with her wheel hard-a-starboard, showing the New York her masthead and starboard lights only, while the New York came up the river, still at full speed, under a port wheel, displaying her masthead and port lights to the Conemaugh. Just before the collision, which naturally resulted from these courses, the wheel of the New York was starboarded, but too late to avoid the collision, and, stem on, she struck the Conemaugh on the starboard bow, sinking her within ten minutes. The evidence concurs that the vessels came together on the extreme easterly side of the channel, scarcely a length from the place where the Conemaugh sank, and about 900 or 1,000 feet from, and a little on the port quarter of, the Ferguson,—the stern barge of the Burlington's tow. The amount claimed by the libel for the injuries to the Conemaugh, the expense of raising and repairing her, and the demurrage necessary for repairs, together with the damage done to her cargo, is $70,000. The cross libel alleges that the New York suffered damages to the amount of $3,000.

The answer of the New York admits that her watch heard neither the first nor second signals of the Conemaugh. It further states that "when the New York had arrived at a point abreast of the last barge in tow of the Burlington a signal of two whistles was heard; but being unable to see any vessel, and noticing only a white light close on the Canadian bank of the river, the signal of two blasts was not answered, as it seemed intended for some other vessel. * * *" It is also alleged that the speed of the New York in passing the tow was but four miles an hour, but the proofs establish that she maintained double that speed until the vessels came together. The faults of the New York are so many and flagrant that it may be doubted if judicial records afford a parallel to the negligence and recklessness of her navigation. The admitted facts, that her officers did not even hear the first two signals of the Conemaugh, and, though their attention was challenged to her by her third whistle, did not see her until the alarm whistles were sounded, when the vessels were scarcely a quarter of a mile apart, although the weather was favorable to sight and hearing and the conditions of the locality called for careful navigation, are conclusive that her master and lookout, if she had one, were either incompetent or grossly negligent of their duties. If her lookout saw and reported the lights of the Conemaugh, his exoneration makes the conduct of the master or other officer of the deck, in disregarding that warning, more reprehensible. The Conemaugh's whistle was loud and coarse, and her lights lawfully placed and burning. Nothing can palliate the neg-

ligence which failed to notice either. If the master were at his post, or giving attention to his duties, he should have heard or seen the descending steamer, despite the negligence or even the want of a look-out; for the lights were seen and the signals heard by the crews of the Burlington and her barges, and by persons at the coal dock, who were at a greater distance from the Conemaugh than the New York. Even after the Conemaugh was seen and heard, the action of the New York merits the severest condemnation. Invoking against the Conemaugh steering and sailing rules 19 and 21, the New York neither held her course as required by the first, but by porting thwarted the effort of her adversary to keep out of her way, nor slackened speed, stopped, or reversed, in compliance with rule 21, when the course, position, lights, and alarm whistles of the Conemaugh proclaimed the perilous proximity of the steamers, but kept her speed to the very instant of collision. Under the circumstances, these offenses were scarcely less vicious than the criminal negligence which disregarded the lights and signals of the Conemaugh. The temporary departure of the New York from her general course up the river was necessitated by the position of the Burlington's tow. When she passed that, and saw the Conemaugh, it was her duty to starboard and resume her course as soon as possible, having regard to the exigencies of the situation. The John L. Hasbrouck, 93 U. S. 405-410. There was ample room for her to have obeyed this requirement, which would have taken her under the stern of the Conemaugh. The master of the Conemaugh had a right to expect that this plain duty would have been performed, for his vessel had then crossed the proper path of the New York. A fitter case for the exercise of the disciplinary power committed to the inspectors of steam vessels than that afforded by the navigation of the New York can scarcely be imagined. Revocation of the license of her master, or an extended period of suspension, would have a salutary effect in promoting the safety of life and property on the lakes. The case of the New York is without the shadow of a defense.

Was the Conemaugh guilty of fault contributing to the collision? The argument in her behalf—conceding that if the collision occurred in the proper course of the New York, the Conemaugh must be held in fault, because, having the New York on her starboard side, she failed to keep out of her way—insists that, if she was a safe distance from the New York's lawful course when struck, then her measures to avoid the latter were timely and sufficient, and the New York should be held solely in fault for thwarting, by her unlawful change of course to starboard, the otherwise safe undertaking of the Conemaugh; that the presence of the tow, the distance between the vessels, and their positions and courses when the alarm whistles were sounded, justified the Conemaugh in starboarding to perform her statutory duty under rule 19; and, this granted, the place of the collision is conclusive of the sole liability of the New York. While rule 19 is absolute that the steamer having on her starboard hand another, whose course she is crossing, must keep out of the latter's way, it does not define the course to be pursued to effect that end. To diminish still further the risk of collision between steamers thus approaching, the supervising inspectors, under congressional authority adopted rule 2 of the pilot rules for the lakes and seaboard, prescribing that such steamers "shall pass to the right of each other, as if meeting head and head, or nearly so, and the signals by whistle shall be given and answered promptly,

as in that case specified." In the conditions to which it applies, this rule is to be read into rule 19 of the steering and sailing rules, (Rev. St. U. S. § 4233) Yet, as declared by the inspectors themselves, it is not a rigid and invariable regulation, but is "to be complied with in all cases except when the steamers are navigating a crowded channel, or in the vicinity of wharves, * * *" and is, of course, also qualified by rule 24, (Rev. St. U. S, § 4233,) providing that, in construing and obeying the rules, "due regards must be had to all dangers of navigation, and to any special circumstances which may exist," etc. As it does not absolutely impose on the steamer having another on her starboard hand the duty of porting under all circumstances, it is not inconsistent with the steering and sailing rules. The Atlas, 4 Ben. 27; The B. B. Saunders, 19 Fed. Rep. 121. These steamers were "navigating in a crowded channel," and that fact exempts the Conemaugh from the obligation to port, under pilot rule 2. The New York, in coming up, necessarily held her course close to the descending tow, passing within 50 or 100 feet from the fourth vessel, and only attained that distance by a sharp sheer to the starboard when abreast of the Amaranth, the third vessel in the tow. At that time the Conemaugh was under the stern of the Ferguson. She had crossed the New York's proper course, and the position of the latter in reference to the Burlington's tow left her no room to pass between the New York and the tow. There was, moreover, an unobstructed channel, six or seven hundred feet wide, on the starboard side of the New York. The Conemaugh also had a right to assume that the New York, on clearing the tow, would perform her duty, and resume her normal course. The Free State, 91 U. S. 204; The Scotia, 14 Wall. 170. Under these circumstances, the Conemaugh, with three-fourths of the channel occupied by a tow, though crossing the course of the New York, was not under the rule of port helm, but might properly continue her course, provided there was time and room for that maneuver. If the case involved only the construction of rule 19, the proofs would be conclusive that the only breach of that rule was committed by the New York in failing to pursue her lawful way after passing the tow, but, instead thereof, swinging to starboard, and keeping on until she had overtaken the Conemaugh. Had the New York, after seeing the Conemaugh, even held the course on which she was passing the tow, collision would have been impossible, though she maintained her full speed. But, although the Conemaugh had crossed the lawful path of the New York, she had not cleared her actual course, which was indicated by the disappearance of the New York's green light between the Conemaugh's third signal and her alarm whistles. Up to the Conemaugh's second signal, her navigation had been cautious, and in exact conformity to the statutory and inspectors' rules. With a full watch, running under check, displaying proper lights, and sounding her whistle seasonably and repeatedly, she had exhausted every effort to herald her appearance, position, and purpose. Even to the giving of her third signal, the only criticism made of her conduct is based on inspectors' rule 3, that, though under check, she was not "slowed to a speed barely sufficient for steerage way," although the vessels had then approached within a half a mile of each other, and no understanding had been established with the ascending boat. This, however, though an infraction of that rule, had no relation to the collision; for the vessels were then so far apart, and on such courses, and held such relative

positions to each other and the tow, that without risk of collision the Conemaugh would have safely crossed the bows of the New York, had the latter held her lawful way. But when the New York shut in her green light, its disappearance announced, and the alarm whistles of the Conemaugh acknowledge, risk of collision, which imposed on each, in their then dangerous proximity, the duty of stopping and reversing. Both were knowingly, under the operation of rule 21, on courses involving risk of collision. The fact that the New York had not responded to either signal, but was drawing near at full speed, with the eyes and ears of her watch closed to the presence and purpose of the Conemaugh, despite the warnings of her lights and signals, called for the extremest precautions on the part of the latter, and should in some measure have prepared her for the necessity of their instant adoption.

It is said that the silence of the New York was not conclusive evidence that she had not heard the signals of the Conemaugh; for notwithstanding pilot rule 6 expressly requires that passing signals by whistle shall be given and answered "at all times when steamers are passing or meeting at a distance within half a mile of each other, and whether passing to starboard or port," the rule, it is matter of common knowledge, is often violated, despite the fact that failure to obey it has frequently been held the ground of condemnation of the offending vessel. The B. B. Saunders, 19 Fed. Rep. 118; The Garden City, Id. 533; The W. H. Beaman, 18 Fed. Rep. 334.

The presumption of law, however, is that the nonobservance of the rule by the New York was not willful. Moreover, under no circumstances should the prevalence of this illegal practice be received to excuse noncompliance with rules 21 and 24 of the steering and sailing rules. If it was prudent to check speed when approaching a tow moving in the same direction, the necessity of still greater care when she was about to meet and cross the course of a steamer rushing up the river at full speed, in evident ignorance of the presence of a descending vessel, was infinitely more obvious and urgent. Though not called upon to stop when no response was made to her passing signal, because she had the tow between herself and the New York, and there could be no collision while that was the case, yet, when the Conemaugh emerged from that shelter, she did so with knowledge, or at least reason to believe, that her presence was unknown to the New York, and that the safety of her advance was contingent on the latter's adherence to her course, which, though probable, was not assured, because the Conemaugh apparently was not a factor in her navigation. The Conemaugh, therefore, could not safely proceed in the expectation that the New York would obey rule 19, and hold her course, in the absence of knowledge on her part that there was a vessel in the vicinity to whom she owed that duty. The steering and sailing rules governing the course of vessels meeting in various situations contemplate that each knows the facts upon which it is called to act. If one alone has that knowledge, and perceives, or has reason to believe, that the other has not, she cannot justify proceeding on the course prescribed for the situation, and, in the event of a collision, ask the determination of the controversy by the rule of that course alone, regardless of the cognate rules of navigation. These rules are all qualified by rule 24, which enjoins due regard to the dangers of navigation, and special circumstances rendering departure from them neces-

sary to avoid immediate danger. There could scarcely be a greater "danger of navigation" than a large steamer approaching at full speed in the nighttime, in apparent ignorance of the presence of another. Each of such vessels is a menace to the safety of another, because their co-operation to a safe course is impossible. Under such circumstances, rules 21 and 24 are of paramount force. They condemn the effort of the Conemaugh to cross the bows of the New York without first obtaining recognition, and for failing to stop and reverse in so grave a peril as that produced by the New York's speed and change of course; and they and rule 19 condemn the New York for changing her course, and failing to stop and reverse when she saw the Conemaugh. In such a situation, failure to stop and reverse is an almost unpardonable sin against the maritime code. The Manitoba, 2 Flip. 241; Id., 122 U. S. 97, 7 Sup. Ct. Rep. 1158; The Stanmore, 10 Prob. Div. 135; The D. S. Gregory and The Washington, 2 Ben. 226, 236. It is strongly urged that this error has nothing to do with the disaster. That conclusion would require for its support clear proof, not merely that the violation of rule 21 did not probably, but could not have contributed to the collision. The Pennsylvania, 19 Wall. 125; The Fenham, L. R. 3 P. C. 212; Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408, 422, 10 Sup. Ct. Rep. 934. The proofs have not this force, but leave it at least doubtful whether the Conemaugh could have been stopped in time to avert the collision. The master, whose ingenuous and straightforward manner on the witness stand commends his testimony, frankly stated that he could not say whether or not that could have been done. The fact that the Conemaugh was struck abreast of the pilot house, about 30 feet abaft her stem, is persuasive at least that, had she stopped, she would have escaped the blow inflicted by the New York, though the New York might not have been so fortunate. The severe rule which makes the trangression of the statute prima facie a contributory cause is, however, not infrequently relaxed; and the most forcible consideration urged for the acquittal of the Conemaugh is founded on the indulgence of the courts to an error committed by a vessel which has been brought into immediate jeopardy by the fault of another. In such a case the injured party is not debarred from the recovery of damages if his vessel has done something wrong, and has not been maneuvered with perfect skill and presence of mind. Instances of application of this doctrine are: Steamship Co. v. Rumball, 21 How. 383; The Nichols, 7 Wall. 656–666; The Carroll, 8 Wall. 305; The Elizabeth Jones, 112 U. S. 526, 5 Sup. Ct. Rep. 468; The Maggie J. Smith, 123 U. S. 355, 8 Sup. Ct. Rep. 159; The Blue Jacket, 144 U. S. 371–391, 12 Sup. Ct. Rep. 711; The Bywell Castle, 4 Prob. Div. 219.

The argument is that the effort of the Conemaugh to keep out of the way by starboarding was justified by the circumstances which constitute the exception to pilot rule 2, namely, the obstruction created by the tow, and the danger of her attempting to pass between it and the New York, and, as the Conemaugh had met every requirement of prudence and the rules of navigation up to the instant of the New York's unlawful change of course, her failure to stop and reverse in the sudden emergency thereby produced should be held error in extremis. If the Conemaugh had come up in a position in which she was passing when the New York ported under assurances from the latter that the Conemaugh's presence was known, it might well be claimed that the cir-

cumstances disarmed the master of the latter of suspicion of danger, and entitled the Conemaugh's advance to the most lenient judgment. But such was not the case. The very vigilance of the Conemaugh as she neared the path of the New York recognized the danger of the situation before the New York ported, and her master frankly admits that after she ported he thought "there wasn't much chance to get away from her," when the Conemaugh starboarded hard just after sounding her alarm whistles. The apprehension that, if the New York should accept and act upon the passing signals by stopping and reversing, the Conemaugh would have been "in the road of the New York," cannot be admitted to justify the failure to take that precaution. There was nothing to suggest the probability of such action on the part of the New York, but on the contrary her actual course negatived the supposition. There could be but one result if both vessels persisted in going ahead. Every instant of advance made this more manifest. Stopping, if not an assurance of safety, was manifestly less dangerous than a race for the point of intersection, which at furthest was not more than 700 feet away. It is true that a master is entitled to have time to comprehend the exigencies of the situation before he can be held to have transgressed its law; or, to quote the language of the court in The Emmy Haase, 9 Prob. Div. 81, approved in Maclaren v. Campagnie Francaise, L. R. 9 App. Cas. 649, and The Beryl, 9 Prob. Div. 137, 138: "A man must have time to consider whether he should reverse or not. The court is not bound to hold that a man should exercise his judgment instantaneously. A short—but a very short—time must be allowed for that purpose." The time, however, must be measured, not by the watch, but by the circumstances. The conditions in this case, preceding the New York's change of course, were, as has been said, preparatory and cautionary. They so plainly forbade experiment that the duty of stopping and reversing needed no consideration. It seems to me it should have occurred to the officer on deck before his vessel had run a length. The equities of the case are so strongly in favor of the Conemaugh that the conclusion that she was also in fault has been reached with reluctance, and not without considerable doubt, in view of the extent to which adjudged cases of high authority have gone in referring collisions, in circumstances not unlike these, solely to the fault of the flagrant transgressor. The great disparity of fault has invited and received the consideration it merits. Bnt the impossibility of enforcing the great commandment of the law of navigation which calls a halt when risk of collision is involved, compels me to adjudge both vessels at fault; and a decree will be entered to that effect, and the usual order of reference to a commissioner to ascertain and report damages. The costs will be equally divided.

EXHIBIT "B."

Opinion of District Judge on rehearing, filed May 16, 1895.

(Record p. 227.)

Upon the hearing of this case, the court found both vessels at fault for the collision, and accordingly referred it to a master to ascertain and report the damages in the cause. The reasons given for that conclusion are stated in the case of The New York, 53 F. R., 553, and were reached as there stated, with considerable doubt as to their correctness. A rehearing was had upon the petition of libellant and the matter was taken under advisement before the court. A careful re-examination of the testimony in the case, the admitted circumstances attending the collision and the rule of law applied by the Supreme Court of the United States, since the former decision of this cause, have satisfied me that in holding both vessels at fault, too harsh a judgment was passed upon the conduct of the master of the Conemaugh in holding that vessel in fault for the failure to stop and reverse, instead of going ahead at full speed in its efforts to escape the New York.

The answer and cross-libel filed by the owners of the New York says: "While passing under the stern of this barge (the Ferguson), and not more than ten or twenty feet from here, several short blasts of the whistle of the propeller, which proved to be the Conemaugh, were heard close at hand and not more than one hundred feet away. The Conemaugh pursued her course directly across the bows of the New York, which was then swinging under a hard-a-starboard helm. A collision was then inevitable, and there was neither time nor room enough to stop the engine of the New York, and the only way left open to avoid a collision was to continue under headway and swing clear under a hard-a-starboard helm." This admission was not called to the attention of the court at the first argument of the cause, and although it states the distance between the vessels at the time of the alarm signals by the Conemaugh, at less than that found by the court, its significance is—whatever that distance may have been—that at the time those alarm signals were sounded, the collision was confessedly inevitable. The New York was ascending the river at a speed of ten miles an hour. The Conemaugh was running at half that speed, and up to this time, had been navigated with great circumspection. When these signals were sounded the vessels were probably not to exceed 1,200 feet apart, and would cover that distance in less than one minute and in so doing, the former finding of this court was that the proofs "leave it at least doubtful whether the Conemaugh could have been stopped in time to avert the collision."

This conclusion—that is the doubt which it admits—require under the latest decisions of the Supreme Court, the acquittal of the Conemaugh.

As found in the former opinion, there would have been no collision had not the New York unlawfully changed her course upon being apprised of the proximity of the Conemaugh. This error superadded to the many and flagrant prior faults of the New York's navigation, should be held solely responsible for this collision.

In the case of the City of New York, 147 U. S., page 85, the language of Mr. Justice Brown, who delivered the opinion of the court, is most opposite to the facts of this case. He there says—speaking of the collision between a steamer and a sailing vessel: "In view of the recklessness with which the steamer was navigated that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be clear and convincing. Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least, adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel, should be resolved in its favor." While this doctrine is not new, and many cases are cited in the opinion filed in this cause, expressing the same rule of judgment, it is an application of that rule under circumstances much less excusatory of the acquitted vessel than those which mark the collision in this cause. While it is true, as stated in our former opinion herein that the conditions preceding the New York's change of course, were preparatory and cautionary, and it was because of that fact that the Conemaugh was adjudged in fault for not stopping and reversing, in the light of all the circumstances and in view of the grossly negligent navigation of the New York when contrasted with the generally cautious management of the Conemaugh, and the perilous emergency in which the latter was placed by the wrong doing of the New York, justice to the Conemaugh requires the application of the rule which I reluctantly declined to follow in the former opinion that where a vessel, which has been brought into immediate jeopardy by the fault of another, the injured party is not debarred from the recovery of damages if his vessel has done something wrong and has not been maneuvered with perfect skill and presence of mind. The proof of the Conemaugh's complicity in wrong doing is not "clear and convincing" and she ought not to be held.

The case of the Alexander Folsom, 52 F. R., 403, is another instance of the application of the rule similar to that of the City of New York, 147 U. S., page 85, where the reasons for holding the error committed by one of the vessels in a collision as pardonable because in extremis were no more cogent than here.

This conclusion requires that the former decree in this cause be vacated and that a decree be entered herein, holding the New York solely in fault for the collision, and that the reference heretofore ordered in this cause be proceeded with for the ascertainment of libellant's damages, including the damages suffered by the petitioners, who have intervened in the cause, and that the cross-libel of the owner of the New York be dismissed with costs.

(Signed) HENRY H. SWAN,
District Judge.

EXHIBIT "C."

Opinion of the Circuit Court of Appeals.

(82 Fed. 821.)

TAFT, Circuit Judge (after stating the facts). We must first decide what are the rules of navigation to which the colliding vessels were obliged to conform. The collision occurred in Canadian waters, and it is contended by counsel for the appellee that the Canadian statute of navigation must govern the court in consideration of the conduct of the parties. It is settled by the decisions of this court in The North Star, 22 U. S. App. 242, 10 C. C. A. 262, and 62 Fed. 71, and The City of Mackinac, 43 U. S. App. 190, 20 C. C. A. 86, and 73 Fed. 883, that, in the absence of the proof of the Canadian statute, the proper navigation at the time of this collision was prescribed by section 4233 of the revised statute of the United States, as supplemented by the rules adopted by the supervising inspectors under the authority of section 4412, revised statutes. It is conceded that at the hearing in the court below the Canadian statute was not introduced in proof, and that neither the counsel nor the court relied on its provisions. It is also apparent from the evidence that the captains of the colliding vessels both regarded themselves as acting under and subject to the federal statute and the supervisors' rules at and before the time of the collision. At the hearing of the motion made by the libelant for a rehearing and a modification of the decree so as to hold the Conemaugh free from fault, some reference seems to have been made to the Canadian statute. This we gather, not from the record, but from the affidavits of the counsel for libelant, and the clerk of the district court, filed in support of a motion for a certiorari. From the affidavit of the clerk it is to be inferred that the reference to the Canadian statute was only arguendo, and that there was no formal offering of the same in evidence. Indeed, it is difficult to understand how there could have been an offering of the same as evidence upon the issue made on the pleadings, because the action of the court in modifying the interlocutory decree seems to have taken on the evidence as adduced at the trial, and without a new hearing of the cause. The motion of libelant for rehearing asked for leave to introduce new evidence, but the Canadian statute was not mentioned in the description of the evidence to be offered. The respondent asked leave to introduce new evidence after the court had modified the decree, and this was denied. Now, the respondent had stood upon the evidence of libelant at the trial, and had adduced no evidence of its own. If the libelant had been permitted, on a rehearing, to introduce the Canadian statute, and to change materially the rules of conduct to which the parties were to be held, then it would seem hardly fair not to have allowed the respondent to call its witnesses to meet a different case from that in which it had not deemed it necessary to call any one. But, disregarding these considerations, the conclusive reason why the court can not consider the Canadian statute as part of this record is found in the return of the district court to the writ of certiorari. It contains no certificate that the Canadian statute was made part of the record by being offered and received in evidence, but only a statement by the clerk that that which is returned is a correct copy of the Canadian statute, as

published. The district court and the clerk seem to have construed the action of this court in issuing the writ as a decision or finding that the Canadian statute was a part of the record below, and an order to certify the same, whereas the writ merely directed the court to complete the record if, in any respect it was defective, leaving to that court to decide what constituted its record. We cannot regard the Canadian statute, therefore, as in evidence, or as part of the record before us. It might have been a question, even if the Canadian statute had been properly proved, whether two merchant vessels of the United States, proceeding from one port of the United States to another, and incidentally crossing and recrossing the national boundary, were not, though in Canadian waters, still to be held by a court of the United States as bound by section 4233, the opening words of which are as follows: "The following rules for preventing collisions on the water shall be followed in the navigation of vessels of the navy and of the mercantile marine of the United States." We do not decide this point, because, though suggested by counsel, it is not before us. All that we do hold is that, in the absence of the proper proof of the Canadian statute, the presumption is that section 4233 and the supervising inspectors' rules furnish the law of navigation for the cause.

It is not disputed that the courses of the two vessels were crossing so as to involve risk of collision, and that the Conemaugh had the New York on her own starboard side. Under such circumstances, by rule 19 of section 4233, Rev. Stat., the Conemaugh was required to keep out of the way of the New York; and by rule 23 the New York was required to keep her course, unless, as provided in rule 24, special circumstances existed, rendering a departure from rule 22 necessary to avoid immediate danger. Rule 2 of the supervising inspectors further limited the discretion which the Conemaugh had in selecting the manner in which she could keep out of the way by providing that when steamers were approaching each other in an oblique direction, as these were, they should pass to the right of each other, as if meeting "head and head," or nearly so. The learned district judge was of opinion that rule No. 2 did not apply in this case, because he thought the situation here was within an exception to rule 2 stated in a note to the supervising inspectors' rules, by which all the rules are made inapplicable to steamers navigating in a crowded channel. In this we cannot agree with him. The width of the navigable channel between the tow and the Canadian shore before and at the time of the collision, was variously estimated as from 500 to 750 feet. For reasons which we shall hereafter state, we think it was about 500 feet. The Conemaugh had not entered that channel, but was above it in the river at least 300 feet. She had the whole width of the river on her starboard hand, and had full opportunity to port her helm and run down into the bight of the tow, out of any danger, had she desired to do so, and this with very little delay. Had she done this, there would have been no collision. It follows that she was guilty of a fault which caused the collision. We should have reached this conclusion even if the Conemaugh was not bound by rule 2 of the supervising inspectors, and was only under obligation to keep out of the way of the New York, with discretion to pass her on either hand. The evidence satisfies us that the Conemaugh was in the course of the New York when the collision occurred. What was the course of the New York? Her general course was upstream, and probably, if she followed the usual track

of steamers (though this was not invariable,) a little towards the American side of midchannel. It is well settled, however, that a vessel does not depart from her course when she turns from her general course to avoid obstructions, of which the vessel keeping out of her way must know the existence and must allow for the effect. The Iron Chief, 22 U. S. App. 473, 11 C. C. A, 196, and 63 Fed. 289; The John L. Hasbrouck, 93 U. S. 405; The D. S. Stetson, 4 Ben. 508, 7 Fed. Cas. 1132; The John Taylor, 6 Ben. 227, 13 Fed. Cas. 896; The Velocity, L. R. 3 P. C. 44; Mars. Mar. Coll. (2 Ed.) 473.

The proper course of the New York was that which the Conemaugh ought to have known she would naturally have taken had the Conemaugh not been in sight. As the New York came up the river the Burlington's tow was stretched across the river, and by an exchange of single blasts a proper agreement had been reached, by which the New York was obliged to go round the tail of the tow, having it on her port hand. This required the New York, coming up on the American side of the channel, to port her wheel and change her course toward the Canadian shore. As she was about a mile distant when the signals were exchanged, it is highly probable that she could not, in a dark night, at once determine the length of the tow, or fix the place of the last barge in it. It was entirely natural and proper navigation for her to change her course only moderately to starboard until she could pick up the tail of the tow, and avoid going uselessly near the Canadian shore, and more out of her general course up the river than necessary. The evidence shows, then, that after first porting her wheel, she ran on a course which would have carried her into the Amaranth, the third barge in the tow; that when about 800 feet away she ported again, and took a course which was about parallel with the then course of both the Amaranth and the Ferguson, the last two barges of the tow, and 100 feet distant therefrom, towards the Canadian shore. Their course was about two or three points towards the American shore from the course of the river and channel, and so the course of the New York was then two or three points from the midchannel line towards the Canadian shore. The great weight of the evidence establishes that the New York did not again change her course to starboard after she ported her wheel 800 feet away from the tow to pass the last two barges. The libel charges that when near the last barge she ported her wheel and swung violently to starboard, and thus brought about the collision. We think the evidence utterly fails to show this, and that she made no change of her course to starboard which the presence of the tow, sagging downstream, and slowly crawling across the river, did not make necessary. But it is said that after the New York passed the tow her proper course was to swing to port under the stern of the last vessel in the tow, and thence over toward midchannel, instead of which she continued on towards the Canadian shore, and ran into the Conemaugh. It is undoubtedly true that the New York's proper course, after passing the tow, was to resume her general course upstream near midchannel. The John L. Hasbrouck, 93 U. S. 405. All the witnesses who observed her course admit that just before the collision she was swinging under a starboard wheel. It would seem, therefore, that she had begun to change her course to port; and the only question is, did she begin to do this as soon as she ought to have done it? How soon ought she to have done it? She was not obliged to turn a sharp corner round the stern of the last barge on the tow. She certainly would not have done this had the

Conemaugh not been there, and, as we have seen, her proper course could not be affected by the fact of the Conemaugh's presence. Her natural course would have been to swring gradually to port under a slowly-turning starboard wheel, so as to make an easy sweep back to midchannel. The Conemaugh could not, by pressing on it, make the course of the New York one requiring her to dodge in between the tail of the tow and the Conemaugh. In answering the question whether the actual course of the New York was in accord with her proper course thus stated, we may derive considerable light from the evidence as to the distance of the New York and the Conemaugh from the tow when the collision occurred. The captain of the Conemaugh says the distance was 750 feet. The captain of the Ferguson puts it at about the same distance. The mate of the Conemaugh makes the distance about 300 feet, and this is the effect of the evidence of the captain of the Amaranth. We are of opinion, from the circumstances in the case, that the smaller distance is much more likely to be correct. An examination of the chart shows that the distance which the Conemaugh was from the tail of the tow, when her engines were checked, did not exceed 1,200 feet. The statement of her engineer as to the time between that check and the collision was about four minutes. The relative speeds of the Conemaugh and the tow were such that the former was gaining on the latter at least three miles an hour. Allowing for the curved course the Conemaugh took in following the tow down, and allowing half a minute between hard a-starboard swing of the Connemaugh and the collision, she must certainly have been within three hundred feet of the tow when the swing occurred. But it is said that this conclusion is at variance with the place where the Conemaugh grounded on the channel bank. The weight of the evidence shows that the distance of the tow from the Canadian shore was about 750 feet. The channel bank was about 235 feet feet from shore. This left the channel between the tow and the bank about 515 feet. It is not clear just how much time there was between the starboarding of the Conemaugh's wheel and the collision, but it is quite evident that there was some time in which to make headway towards the Canadian shore, and after the collision the evidence is that the engines of the Conemaugh worked ahead strong for a minute or more. This is quite sufficient to show that the Conemaugh might have starboarded her wheel at a point about as far from the shore as was the tow, and though when she blew her alarm signal she was but 300 feet from the tow, that after being struck by the New York, and working hard towards the Canadian shore, she might have brought up on the bank at a point much further than 300 feet from the position of the tow, which had been constantly moving away from the point of collision. With the distance between the Conemaugh and the tow but 300 feet, where was the course of the New York with respect to them? It is clear to us that the course of the New York would not naturally be confined to swinging on her starboard wheel through the passage not much wider than her length. That would not have been the easy sweep which she was entitled to make in turning back towards midchannel. The Conemaugh, therefore, being where she was, was either in, or dangerously near, the course of the New York, and was not keeping out of her way. More than this, she increased her fault by throwing herself right across the bows of the New York. The point where the New York struck her, to-wit, only 30 feet from her stem, shows that if, when she blew her alarm whistle, she had ported her helm,

instead of starboarding, she would have entirely avoided the New York by passing that vessel port to port. It is very difficult to explain the navigation of the Conemaugn, or to reconcile some of the statements of the captain of the Conemaugh with the admitted situation of the vessels. He says that when he steadied, after swinging round the Kasota spiles and heading across the river, he saw the red light of the New York coming up the river, and whistled two blasts to her; that as he swung slowly around on his port wheel, following the tail of the tow, he saw both side lights of the New York; and that he continued to do so when he whistled his second signal of two blasts and his third signal of two blasts. An examination of the chart and the necessary courses of the two vessels makes it impossible that he could have seen the green light of the New York from the second to the third blast. The New York was proceeding from the American side is a slanting direction across the river, while the Conemaugh was proceeding down the river in a slanting direction, and each must have been showing to the other but one light. We did not hear in the argument of counsel, nor can we find in the briefs, any explanation how both lights of the New York were so long visible to the Conemaugh as her captain testifies. The other witnesses from the Conemaugh differ with the captain as to the lights shown by the New York. Hogan, the mate, saw only her red light at the time of the third signal, and Crowe saw her red light immediately after the second signal. The only importance of this error in the testimony of the Conemaugh's captain is that it shows that the porting of the New York's wheel twice in her course from the American side to the tail of the tow must have been evident to him before there was any danger of collision. Another circumstance of much significance in this case, the course of the Conemaugh with respect to that of the two last barges of the tow. Both barge captains say that for some time before the third signal blast they saw both side lights of the Conemaugh. Now, this is only possible if the Conemaugh, instead of crossing their wake, was following along in it for an appreciable time while she was blowing the last one, and probably the last two, of the signals to the New York. It thus appears that, while she was blowing signals indicating a purpose to pass the New York starboard to starboard, she was continuing on a course port to port of the New York. It is not explained why, if the captain of the Conemaugh regarded himself as having the right to select his course, and intended, as he says he did, to pass on the Canadian side of the New York, he did not direct his vessel towards the Canadian shore at once, instead of following the tow down on the American side of the course which the New York must follow to clear the barges, and then suddenly swinging across the bows of the New York when that vessel was so near that collision was inevitable. On the whole case, we are clear in the conclusion that there were several glaring faults in the management of the Conemaugh which caused the collision.

The question remains, was the New York also guilty of faults in navigation contributing to this collision? Her owner, in its answer, admitted that those in charge of her neither saw nor heard the Conemaugh until the third double-blast signal, and that then they only heard the signal, without seeing the vessel giving it, and so supposed that the signal was not intended for them. The witnesses for the Conemaugh unite in saying that the New York was going at a speed of 10 miles an hour, and apparently not under check. The district

court found, from her failure to see and hear the Conemaugh, that the New York's lookout was defective, and that she thus committed the fault of not answering the Conemaugh's signals. He further held that she should have checked or stopped when there was risk of collision, and that her failure to do so was a fault contributing to the disaster. It must be conceded that, if the New York had heard the signals of the Conemaugh, she would not have been obliged to respond by a double blast, and signify her willingness to pass starboard to starboard, instead of port to port. Under rule 2 of the supervising inspectors, the Conemaugh was obliged to keep on the New York's port hand, and nothing but her consent—expressed in a double blast—to depart from the rule would justify the Conemaugh in assuming that consent. This was not a case where silence gave consent. Rule 2 requires signals to be given and promptly returned. It has been suggested that this requirement of a prompt answer applies only to the case where the first signal is to indicate a compliance with the rule, and not, as in the case at bar, where the signal invited a departure from it. This suggestion finds some support, it is said, in the language of Mr. Justice Brown in the Delaware, 161 U. S. 459, 16 Sup. Ct. 516, where, speaking for the supreme court, he limits the use of signal blasts by the preferred vessel of two crossing vessels to an announcement that she is maintaining her course according to rule. The learned justice said:

> "These rules, however, so far as they require the whistle to be used, are applicable rather to vessels meeting end on, or nearly end on; and the signals therein provided for are designed to apprise the approaching vessel of the intention of the steamer giving the signal to port or starboard, as the case may be. As applied to vessels upon crossing courses, however, it means, when a single blast is given by the preferred steamer, nothing more than that she intends to comply with her legal obligation to keep her course, and throw upon the other steamer the duty of avoiding her."

We do not find it necessary to decide whether the New York should have returned a signal of one blast or not, because it is clear to us that her failure to do so did not contribute to the collision. So far as the Conemaugh was concerned, the New York's silence was exactly equivalent to her express refusal to consent to depart from the rule by a single blast. There are several cases in which the point has been decided. The John King, 1 U. S. App. 64, 1 C. C. A. 319, and 49 Fed. 469, was a case of crossing vessels, in which the preferred vessel was condemned by the district court for not promptly returning an answer to a signal inviting her to depart from rule 2. The circuit court of appeals of the second circuit reversed this decree, and Judge Wallace, in delivering the opinion of the court, said, referring to the other vessel:

> "It was her duty, under sailing rule 19, to keep out of the way, and the duty of the ferryboat to keep her course. The red light of the ferryboat was plainly visible to the propeller, and there was nothing in the way to prevent the latter from passing astern of the ferryboat. She had concluded previously to pass across the bow of the ferryboat, but had received no consent from the ferryboat to such a course, and there was still time to abandon that purpose and go astern. The latter course

was plainly safe; the former, doubtful; and, quite irrespective of any rule of the supervising inspectors, common prudence required her to adopt the safe course and pass astern. She cannot invoke the aid of any rule of the supervising inspectors to justify her departure from duty without showing that her proposition to depart was heard, understood, and accepted by the ferryboat. If, by her signals, she invited a departure from the ordinary rules of navigation, she took the risk, both of her own whistles being heard, and, in turn, of hearing the response, if response was made."

Again Judge Wallace says, speaking of the ferryboat:

"The signal she gave to the propeller when she got out into the river was the proper signal, viz. one blast, to indicate that she proposed to keep to the right. If she had heard the second signal of the propeller, she could have done no more by way of a proper answer and would have been under no obligation to give a different signal. This signal was given at a time when there was yet opportunity for the propeller to alter her course to starboard and pass astern. If we should assume that she heard the propeller's signal, or ought to have heard it, and should have answered it by two blasts of her whistle, we do not see how the propeller was misled by the conduct of the ferryboat. We do not think, however, that, if the ferryboat had heard the propeller's signals, her failure to answer them would have been culpable. The case, in its legal aspects, is quite similar to that of The B. B. Saunders, 23 Blatchf. 383, 25 Fed. 727, in which the court used this language: 'Notwithstanding the inspectors' regulations, therefore the pilot of the Saunders was not bound to assent to the movement proposed by the Orient, unless due regard to the particular circumstances of the situation required a departure from the ordinary rule. Consequently, his failure to answer the signal of two blasts of the whistle from the Orient was not culpable, unless it was apparent that the Orient could not safely pass astern of the Saunders.'"

See, also, the Florence, 68 Fed. 940; The St. John, 7 Blatchf. 220, Fed. Cas. No. 12,224; The Milwaukee, Brown, Adm. 313, Fed. Cas. No. 9,626.

It is manifest to us that the failure of the New York to respond by a one-blast signal to the two blasts of the Conemaugh had no causal relation to the collision, because the silence of the New York was full notice to the Conemaugh that she must obey rule 2.

Again, how did the New York's failure to see the Conemaugh contribute to the collision? Suppose the New York's lookout had seen every maneuver of the Conemaugh, would her course have been different from what it was? We do not think so. She had the right and duty to maintain her course, and that we have found that she did. She would have had no right to infer that the Conemaugh would suddenly cross her bows, however alert her watch. She would have been justified in supposing that the Conemaugh, not having established an agreement to pass starboard to starboard, would maintain her bearing to the port of the New York, and swing clear on that side. Especially in this the case when, if she had seen the Conemaugh, she would have observed her swinging slowly to the port of the New York, in the wake of the barges in the tow, although blowing signals of her

intention, if assented to, to change her course to the starboard of the New York. But it is said she ought to have stopped and reversed when there was risk of collision. The only risk of collision would have been in the Conemaugh's failure to keep to the port hand of the New York, and this failure she was not bound to anticipate. The law on this subject has been settled by the supreme court in The Brittania, 153 U. S. 130, 14 Sup. Ct. 795 and The Delaware, 161 U. S. 459, 16 Sup. Ct. 516. In the latter case Mr. Justice Brown, speaking for the supreme court, used this language:

> "The duty of a steamer having the right of way, when approaching another steamer charged with the obligation of avoiding her, has been the subject of much discussion both in the English and American courts. That her primary duty is to keep her course is beyond all controversy. It is expressly required by the nineteenth rule of the original International Code (Rev. St. § 4233), and the of sixteenth rule of the Revised Code of 1885, and doubtless applies so long as there is nothing to indicate that the approaching steamer will not discharge her own obligation to keep out of the way. The divergence between the authorities begins at the point where the master of the preferred steamer suspects that the obligated steamer is about to fail in her duty to avoid her. The weight of English, and perhaps of American, authorities, is to the effect that, if the master of the preferred steamer has any reason to believe that the other will not take measures to keep out of her way, he may treat this as a 'special circumstance,' under rule 24, 'rendering a departure' from the rules 'necessary to avoid immediate danger.' Some even go so far as to hold it the duty of the preferred vessel to stop and reverse when a continuance upon her course involves an apparent danger of collision. Upon the other hand, other authorities hold that the master of the preferred steamer ought not to be embarrassed by doubts as to his duty, and, unless the two vessels be in extremis, he is bound to hold to his course and speed. The cases of The Britania, 153 U. S. 130, 14 Sup. Ct. 795, and The Northfield, 154 U. S. 629, 14 Sup. Ct. 1184, must be regarded, however, as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty. If the master of the preferred steamer were at liberty to speculate upon the possibility, or even the probability, of the approaching steamer failing to do her duty and keep out of his way, the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness of action on the part of both which would bring about more collisions than it would prevent. Belden v. Chase, 150, U. S. 674, 14 Sup. Ct. 264; The Highgate, 62 Law T. (N. S.) 841, 6 Asp. 512."

This clearly shows that the New York had the right to maintain her speed, as well as her course, unless there was to her some distinct

indication that the Conemaugh was not going to keep out of her way by porting. She received no such distinct indication until the Conemaugh suddenly starboarded her helm and swung across the fast-approaching bows of the New York, and then it was too late to avoid the catastrophe. We find, then, that it was the fault of the Conemaugh which alone caused this collision, that the libel of her owner should therefore be dismissed, and that on the cross libel of the owner of the New York a decree in personam against the owner of Conemaugh for the agreed damage to the New York should be entered. This conclusion disposes also of the petition of the intervening insurance companies, which must also be dismissed. The decree of the district court is therefore reversed, with directions to enter a decree in accordance with these conclusions.